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RE: Tribal Government Comments, DFARS Case 2002-D033

Goldbelt, Incorporated submits the following comments with respect to DFARS Case 2002-D033. Goldbelt has three specific concerns in regard to the implementing language proposed within the interim rule. First, we are concerned that the interim rule does not effectuate the explicit contract insertion purview of Section 8021, which specifies that the Indian Incentive Program (IIP) must be included in all contracts and subcontracts "*whenever*" over \$500,000. Based on the interim rule, it appears that the clause is to only be used at the Contracting Officer's discretion, and only if the Contracting Officer can be convinced that opportunities for subcontracting to Native firms "may exist." Second, we are concerned that there are those agencies within DoD that may decide to narrowly define the manufacturing language enacted by Congress, which requires that a Native firm be the "producer or manufacturer" of the items, "in whole or in part." Any DoD agency initiative to more narrowly define the definition of a manufacturer, in whole or in part, may have a deleterious impact throughout Indian Country, and may bring irreparable harm to Native firms. Third, we are concerned that the rule makes no mention of subcontract "tiering" in 252.226-7001, as required by Section 8021.

Issue 1 – \$500,000 "Threshold" versus \$500,000 "Mandatory Contract Insertion"

At this time, we are confident that the purview of the legislation requiring the IIP to be included in all contracts "*whenever*" over \$500,000, is to eliminate the never ending debate between the Contractor, the Native firm, and the Contracting Officer, as to whether or not an opportunity for subcontracting to Indian firms "may exist." Currently, the "statutory authority" necessary to create a condition requiring that the Contracting Officer must be convinced that subcontracting opportunities "may exist" for Native firms, as a prerequisite to amending a contract with the IIP, does not exist. Based on Section 8021, any contract or subcontract "*whenever*" over \$500,000 must include the IIP whether or not the Contracting Officer believes an opportunity "may exist" for Native firms. To eliminate the real possibility that a Contracting Officer may not be compelled to use the IIP in a contract or subcontract, as required by Section 8021, we suggest the following changes, shown by strikethrough and all caps:

226.104 Contract Clause.

Use the clause at 252.226-7001, Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns, in all solicitations and contracts for supplies or services exceeding \$500,000. ~~in value for which subcontracting opportunities may exist.~~

And also:

252.226-7001.

(g) The Contractor, AND SUBCONTRACTORS AT ANY TIER, shall insert the substance of this clause, including this paragraph (g), in all subcontracts exceeding \$500,000. ~~for which further subcontracting opportunities may exist.~~

Issue 2 – Concern of Incorrectly Defining a “Manufacturer” by DoD Agencies

At this time, we are concerned that there are those agencies and/or Contracting Officers within DoD that may incorrectly decide to narrowly define the manufacturing language legislated by Congress, which requires that a Native firm be the “producer or manufacturer” of the items, “in whole or in part.” Although this definition of manufacturer is extremely broad, the DAR Council’s language explicitly reflects Congress’s “original intent that incentives authorized in the Indian Financing Act be applied broadly,” as identified in the FY 2003 DoD Appropriations Act Conference Notes. For any DoD agency to more narrowly define Congress’s “in whole or in part” legislation, would be inappropriate, unjust, and would almost certainly contradict Congress’s specific guidance to apply the IIP “broadly.”

Although we greatly appreciate the DAR Council’s decision to reflect the statutory requirements of Section 8021, with respect to the “in whole or in part” legislation, we would like to offer a reasonable recommendation to clarify the intent, to ensure that no agency may improperly narrow the scope of this definition beyond the statutory guidelines enacted by Congress. In order to support the requirement that an Indian manufacturing firm be the producer or manufacturer of the items in whole or in part, we suggest that the manufacturing standards established by the NAICS codes be referenced as part of the final rule. We are confident that the most reasonable method to define an Indian manufacturer would be to use the federal governments’ own NAICS standards, and not to permit each DoD Agency, and/or Contracting Officer, to create a variety of unprecedented, possibly illegal definitions of manufacturer.

Utilizing the NAICS definitions of a manufacturer in the final rule will ensure that no Indian firm categorized by the SBA as a manufacturer, will be improperly eliminated from the IIP, as the result of an erroneous definition that may be independently propagated by an agency of the DoD. Without doubt, barring an Indian company from the IIP that meets the NAICS definition of a manufacturer, while not meeting some agency created definition of a manufacturer for purposes of the IIP, would be abhorrent and most likely unlawful. To minimize the possibility that an unlawful definition of “manufactured in whole or in part” may be improperly promulgated by an individual DoD agency, we strongly recommend the following change to the final rule, which is clearly consistent with the new SBA Section 8(a) program language, as referenced in Section 8021 of the 2004 Appropriations Act:

252.226-7001.

(f)(3) In the case of contracts for commercial items, the contractor may receive an incentive payment only if the subcontracted items are produced or manufactured in whole or in part, as defined by the North American Industry Classification System (NAICS), by an

Indian organization, Indian-owned economic enterprise, or Native Hawaiian small business concern.

Issue 3 – Absence of Section 8021 Congressional “Tiering” Language within 252.226-7001
Please see recommended language modification under “Issue 1,” as stated above for 252.226-7001.

We greatly appreciate your time and your sincere consideration of our “issues.” If the DAR Council should choose to modify the final rule beyond the scope proposed within the interim rule, we would greatly appreciate your contacting our Tribe, to ensure that proper “Consultation and Coordination” occurs between the United States government and the government of the [Indian Tribe]. Based on numerous federal statutes, Court decisions, and Executive Orders, all deriving from the *Constitution*, the DAR Council’s consultation and coordination with the Tribes would be desirable.

Respectfully yours,
Goldbelt, Incorporated



J. Gary Droubay
President & Chief Executive Officer